Setegap Bhd (in creditors' voluntary winding up) v Ranhill Engineers and Constructors Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22NCC-859 OF 2010
NALLINI PATHMANATHAN J
7 OCTOBER 2011

Civil Procedure — Counterclaim — Application for — Right of set off — Plaintiff wound up under creditors' voluntary winding up — Whether defendant managed to prove losses it claimed by way of counterclaim — Whether defendant could set off counterclaim against judgment sum

Contract — Building contract — Claim for work done — Subcontract — Counterclaim for delay in completion and defective works — Whether defendant entitled to set off costs incurred in completing works and in rectifying defects caused by plaintiff — Damages — Liquidated ascertained damages (LAD) — Whether defendant entitled to LAD — Whether defendant produced sufficient evidence to support its contention that it had suffered loss and damage in order to claim LAD

By a letter of award dated 23 December 2004, Ranhill Engineers and Constructors Sdn Bhd ('the defendant') had awarded Setegap Bhd ('the plaintiff') a subcontract for the construction of intake treatment works and all ancillary works. The plaintiff claimed that it had carried out the works under the subcontract on or about 1 January 2005 but that the defendant had failed to pay the sums due and owing to it. The plaintiff thus commenced the instant action for the sum of RM1,525,814.64, being the sums due and owing to it under the subcontract together with interest and costs. In its defence the defendant submitted that despite being granted two extensions of time and various reminders, the plaintiff had failed to deliver the subcontracted work on time. Apart from the delay the defendant also submitted that the works completed by the plaintiff were defective works, which necessitated two third party contractors being appointed to complete the work and make good the defects. The defendant thus filed a counterclaim wherein it sought to set off the costs it had incurred in completing the works and in rectifying the defects caused by the plaintiff and to also claim for liquidated ascertained damages ('LAD') as set out in cl 8 of the contract between the parties for the delay in completion. Given that the plaintiff's claim was for RM1,525,814.64, the defendant contended that by reason of its counterclaim in the sum of RM1,918,812.85 it did not owe the plaintiff any monies but was instead owed the sum of RM392,998 by the plaintiff. The plaintiff submitted that the defendant had failed to establish that as a consequence of the delay, if any, by

the plaintiff it actually suffered the loss claimed in respect of the LAD. The plaintiff thus contended that the defendant was not entitled to LAD of RM1,049,000, notwithstanding the provisions of the contract. On the day of the trial the parties agreed that the plaintiff was entitled to judgment in the sum of RM1,525,814.64 and a consent judgment was recorded to this effect. However, this was subject to the defendant's counterclaim which had to be adjudicated. The plaintiff did not call any witnesses in support of its defence to the defendant's counterclaim but put the defendant to proof of its entire claim. Accordingly the instant judgment only dealt with the counterclaim and the issues to be determined were whether the defendant had managed to prove the losses it claimed by way of counterclaim and if so, whether that loss could be set off from the judgment entered in favour of the plaintiff, as the plaintiff had been wound up under a creditors' voluntary winding up.

Held, entering consent judgment and allowing the defendant's counterclaim with no set off:

(1) There was sufficient basis to conclude that the defendant had in fact appointed the two third party contractors to ensure the completion of the works as well as the rectification works. From the preponderance of evidence, namely the letters of award and their contents and the oral evidence of the defendant's senior project engineer as was corroborated by the defendant's project accountant, it was clear that these two third party contractors were paid sums of RM20,000 and RM61,140 respectively, inclusive of the surcharge. However, the court found that the defendant was only entitled to claim the quantum paid to these two third party contractors without the additional 20% surcharge that it levied because such levy was unilateral. Thus the defendant was only entitled to claim the sum of RM17,250 and RM50,950 from the two third party contractors (see para 17).

(2) After having considered the totality of the available evidence, namely the plaintiff's own letters asking the defendant to purchase materials on its behalf and the debit notes issued by the defendant to the plaintiff, it was clear that the plaintiff had required the defendant to purchase construction materials on its behalf and that these materials were purchased and supplied to the plaintiff. The defendant was thus entitled to claim the sum of RM719,570.45 in respect of the purchase and supply of materials (see paras 18–19).

(3) The defendant's claim for salary, overtime, travelling claims and petrol claims in relation to consultants was unsupported by any documentary evidence. Further the internal memorandum issued by the defendant in respect of this claim suggested that it amounted to a unilateral imposition of these fees by the defendant. As such, this claim was disallowed (see para 24).

(4) From the evidence adduced at trial it was clear that the defendant had granted the plaintiff two extensions of time. However, except for cl 8 of the contract, which was a standard LAD clause, and showing that there was a delay, the defendant produced no evidence to support its contention that it had suffered loss and damage in the sum of RM1,049,000. As it had failed to do so this court, which was bound by the construction accorded to s 75 of the Contracts Act 1950 by the case law, found that the defendant was not entitled to make a claim for LAD in the sum of RM1,049,000 (see paras 31 & 42).

(5) Although the defendant was entitled to judgment in respect of the counterclaim in the sum of RM787,770.45, there can be no set off of this sum from the judgment sum of RM1,525,814.64. This was because when leave was granted to the defendant to bring the counterclaim against the plaintiff, which had been wound up under a creditors' voluntary winding up, there was a specific order issued by the winding up court as to how the judgment sum ought to be dealt with. As such, the defendant had to return to the winding up court to apply for directions as to how it can make a claim or execute upon the judgment it was entitled to (see para 45).

[Bahasa Malaysia summary

Melalui surat award bertarikh 23 Disember 2004, Ranhill Engineers and Constructors Sdn Bhd ('defendan') telah memberi award kepada Setegap Bhd ('plaintif') subkontrak untuk pembinaan kerja-kerja rawatan pengambilan dan semua kerja-kerja tambahan. Plaintif mendakwa bahawa ia telah menjalankan kerja-kerja tersebut di bawah subkontrak pada 1 Januari 2005 tetapi defendan telah gagal membayar jumlah yang kena dibayar dan tertunggak itu. Plaintif dengan itu telah memulakan tindakan ini untuk jumlah RM1,525,814.64, yang merupakan jumlah yang kena dibayar dan tertunggak kepadanya di bawah subkontrak bersama dengan faedah dan kos. Dalam pembelaannya defendan berhujah bahawa meskipun telah diberikan dua lanjutan masa dan pelbagai peringatan, plaintif telah gagal menyerahkan kerja subkotrak mengikut masa. Selain daripada kelewatan itu defendan juga berhujah bahawa kerja-kerja yang telah siap oleh plaintif merupakan kerja-kerja yang mempunyai kecacatan, yang memerlukan dua kontraktor pihak ketiga dilantik bagi menyiapkan kerja tersebut dan memperbaiki kecacatan tersebut. Defendan dengan itu telah memfailkan tuntutan balas di mana ia memohon penepian kos yang terakru olehnya dalam menyiapkan kerja-kerja itu dan dalam memperbaiki kecacatan yang disebabkan oleh plaintif dan juga menuntut untuk ganti rugi boleh kira yang ditentukan ('LAD') sepertimana dinyatakan dalam fasal 8 kepada kontrak antara pihak-pihak kerana lewat siap. Berdasarkan tuntutan plaintif berjumlah RM1,525,814.64, defendan berhujah bahawa oleh sebab tuntutan balasnya berjumlah RM1,918,812.85 ia tidak berhutang dengan plaintif apa-apa wang tetapi sebaliknya plaintif

berhutang RM392,998 dengannya. Plaintif berhujah bahawa defendan telah gagal membuktikan bahawa akibat daripada kelewatan itu, jika ada, oleh plaintif ia sebenarnya telah mengalami kerugian berkaitan LAD itu. Plaintif dengan itu berhujah bahawa defendan tidak berhak terhadap LAD berjumlah RM1,049,000 itu, meskipun diperuntukkan kontrak itu. Pada hari perbicaraan pihak-pihak telah bersetuju bahawa plaintif berhak terhadap jumlah penghakiman sebanyak RM1,525,814.64 dan penghakiman persetujuan telah direkodkan terhadapnya. Walau bagaimanapun, ini tertakluk kepada tuntutan balas defendan yang perlu diadili. Plaintif tidak memanggil mana-mana saksi bagi menyokong pembelaannya terhadap tuntutan balas defendan tetapi telah memanggil defendan membuktikan keseluruhan tuntutannya. Sewajarnya penghakiman ini hanya membincangkan tuntutan balas dan isu-isu yang perlu ditentukan sama ada defendan boleh membuktikan kerugian yang dituntutnya melalui tuntutan balas dan jika begitu, sama ada kerugian itu boleh diketepikan daripada penghakiman yang dimasukkan bagi pihak plaintif, kerana plaintif telah digulungkan di bawah penggulungan sukarela pemiutang.

Diputuskan, memasukkan penghakiman persetujuan dan membenarkan tuntutan balas defendan tanpa penepian:

(1) Terdapat asas yang mencukupi untuk memutuskan bahawa defendan telah melantik dua kontraktor pihak ketiga itu bagi memastikan kerja-kerja tersebut dan juga kerja-kerja pembaikan siap. Berdasarkan keterangan yang banyak, terutamanya surat-surat award dan kandungannya dan keterangan lisan jurutera kanan projek defendan sepertimana disokong oleh akauntan projek defendan, adalah jelas bahawa kedua-dua kontraktor pihak ketiga tersebut telah dibayar sejumlah RM20,000 dan RM61,140 masing-masingnya, termasuklah surcaj. Walau bagaimanapun, mahkamah mendapati bahawa defendan hanya berhak menuntut kuantum yang dibayar kepada kedua-dua kontraktor pihak ketiga tersebut tanpa tambahan 20% surcaj yang dilevinya kerana levi tersebut hanya di satu pihak. Oleh itu defendan hanya berhak menuntut sejumlah RM17,250 dan RM50,950 daripada kedua-dua kontraktor pihak ketiga tersebut (lihat perenggan 17).

(2) Setelah mempertimbangkan keseluruhan keterangan sedia ada, terutamanya surat-surat plaintif sendiri yang meminta defendan membeli bahan-bahan bagi pihaknya dan nota-nota debit yang dikeluarkan oleh defendan kepada plaintif, adalah jelas bahawa plaintif telah menghendaki defendan membeli bahan-bahan pembinaan bagi pihaknya dan bahawa bahan-bahan tersebut telah dibeli dan dibekalkan kepada plaintif. Defendan dengan itu berhak menuntut sejumlah RM719,570.45 berhubung belian dan bekalan bahan-bahan itu (lihat perenggan 18–19).

(3) Tuntutan defendan untuk gaji, lebih masa, tuntutan perjalanan dan tuntutan petrol berkaitan perunding tidak disokong oleh apa-apa keterangan dokumentar. Bahkan memorandum dalaman yang dikeluarkan oleh defendan-defendan berkaitan tuntutan ini mencadangkan bahawa ia membentuk pengenaan satu pihak untuk fi tersebut oleh defendan. Oleh itu, tuntutan ini tidak dibenarkan (lihat perenggan 24).

(4) Berdasarkan keterangan yang dikemukakan semasa perbicaraan adalah jelas bahawa defendan telah memberikan plaintif dua lanjutan masa. Walau bagaimanapun, petikan daripada fasal 8 kontrak, yang merupakan LAD yang fasal standard, dan menunjukkan terdapat kelewatan, defendan tidak mengemukakan apa-apa keterangan untuk menyokong hujahnya bahawa ia telah mengalami kerugian dan kehilangan berjumlah RM1,049,000. Oleh kerana ia telah gagal berbuat demikian mahkamah, yang terikat dengan pentafsiran yang diberikan kepada s 75 Akta Kontrak 1950 melalui kes perundangan, mendapati bahawa defendan tidak berhak membuat tuntutan untuk LAD berjumlah RM1,049,000 (lihat perenggan 31 & 42).

(5) Meskipun defendan berhak terhadap penghakiman berkaitan tuntutan balas bagi jumlah RM787,770.45, tidak perlu ada penepian bagi jumlah ini daripada jumlah penghakiman sebanyak RM1,525,814.64. Ini adalah kerana apabila kebenaran diberikan kepada defendan untuk membuat tuntutan balas terhadap plaintif, yang telah digulungkan di bawah penggulungan sukarela pemiutang, terdapat perintah spesifik yang telah dikeluarkan oleh mahkamah penggulungan berhubung bagaimana jumlah penghakiman patut dikendalikan. Oleh itu, defendan perlu ke mahkamah penggulungan semula untuk memohon arahan berhubung bagaimana ia boleh membuat tuntutan atau melaksanakan penghakiman sepertimana ia berhak (lihat perenggan 45).]

Notes

For cases on application for right of set off, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2451–2452.

For cases on claim for work done, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3308–3323.

Cases referred to

Atlantic Plantation Sdn Bhd v Mature Land Sdn Bhd [2010] 8 MLJ 477, HC (refd)

Hadland Arthur John & Anor v Audra Elaine Gomez [2009] MLJU 736, HC (refd)

Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445, FC (refd)

Keen Builders Sdn Bhd v Utara Dua (M) Sdn Bhd (Samudra (M) Sdn Bhd (Garnishee) [1998] 2 CLJ Supp 256, HC (refd)
Oil & Natural Gas Corp Ltd v Saw Pipes Ltd. AIR 2003 SC 2629 (refd)
Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership) [1996] 2 MLJ 461; [1996] 3 CLJ 823, FC (refd)
Reliance Shipping & Travel Agencies v Low Ban Siong [1996] 2 MLJ 543; [1996] 2 AMR 1793, CA (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/I Retnasamy [1995] 1 MLJ 817, FC (refd)
Sim Hiang Kiaw & ors v Lee Hoi Kim Construction Co [1995] MLJU 444, HC (refd)

Legislation referred to

Contracts Act 1950 s 75

Azwan Jamlus (Amir Feisal Ariff with him) (Loh Chow Tet & Assoc) for the plaintiff.
Nuradilah bt Abdul Rahim (Zulkafli Abdul Hamid with her) (Zulkafli Rani & Co) for the defendant.

Nallini Pathmanathan J:

INTRODUCTION AND BRIEF FACTS

[1] The plaintiff is a subcontractor appointed by the defendant, pursuant to a letter of award dated 23 December 2004, to undertake the subcontract works comprising the 'construction of intake treatment works and all ancillary works' for a project known as the 'New Mersing Water Supply Scheme'. The completion date for the project was 26 October 2005. Pursuant to this contract the plaintiff carried out the works and it maintains that it completed the said subcontract works in or around 1 January 2005. In this context the plaintiff makes claim against the defendant in the sum of RM800,768.75 together with interest and costs.

[2] The plaintiff further contends that it was not paid monies due to it and upon following up on this matter with the defendant, it maintains that the defendant's project accountant, one Fery Efendy Laho conceded orally in a telephone conversation that the sum of RM842,642.78 was due and owing to the plaintiff. Computed to the date of trial, the plaintiff's claim against the defendant is in the sum of RM1,525,814.64.

[3] However the defendant maintained that the plaintiff had failed to deliver the work on time. In fact two extensions of time were granted, the first being on 15 October 2005 and the second on 1 March 2006 both of which were duly granted. The new completion date fixed after the second request was 4 May

2006. The works however, were not completed according to the defendant by that date. Various reminders were issued to the plaintiff on 5 May 2007, 25 June 2007, 9 November 2007 and 21 November 2007 more particularly in respect to the sewer reticulation works and inspection that remained outstanding. Reminders were also issued in respect of the outstanding sewer water pipeline rectification works to the plaintiff on 25 June 2007 and 3 September 2007.

[4] Apart from delay the defendant also contends that the works carried out by the plaintiff were shoddy and unacceptable. Accordingly the defendant maintained that the plaintiff was not entitled to the full sum claimed but considerably less, taking into account the delay and the defective works.

[5] In response to the plaintiff's claim for monies due for works carried out therefore, the defendant filed a counterclaim, seeking to set off the costs it had incurred in completing the works, rectifying the defects caused by the plaintiff and in respect of the delay in completion which took the form of a claim for liquidated and ascertained damages ('LAD'). In their counterclaim the defendant maintains that it was constrained to award contracts to one Melly Enterprise and one Syarikat Wadi to carry out rectification works. Apart from this the defendant also makes claim for advance payments they made to the supplier of materials for the project, and finally make claim for LAD as per the letter of award which places a ceiling of 10% of the entire contract sum amounting to RM1,049,000. In summary the counterclaim of the defendant therefore comprises:

(i) Liquidated and Ascertained Damages	RM1,049,000
(ii) Costs of hiring Melly Enterprise for rectification works	RM20,700
(iii) Costs of hiring Syarikat Wadi for rectification works	RM61,140
(iv) Advance payments made to the supplier of materials	RM719,570.44
(v) Consultant's overtime fees	RM68,401.41
Total	RM1,918,812.85

[6] Given that the plaintiff's claim at the outset of trial (as stated above inclusive of interest) amounts to RM1,525,814.64, the defendant in essence contends that by reason of its counterclaim in the sum of RM1,918,812.85, it does not owe the plaintiff any monies but instead is owed the sum of RM392,998 by the plaintiff.

[7] The plaintiff in response to the defendant's counterclaim maintains that

the onus is on the defendant to prove that it has suffered the losses it claims to have suffered particularly for the alleged late delivery of the project and the defective works. On the day of trial, the parties sought to have it recorded that by consent the plaintiff was entitled to judgment in the sum of RM1,525,814.64 but that this was subject to the defendant's claim which was to be adjudicated upon. Accordingly only the counterclaim was heard and dealt with at trial. The burden therefore at all material times was on the defendant to prove its entitlement to the counterclaim.

ISSUES

[8] The primary issue that arises for consideration in this matter is whether the defendant has managed to prove the losses it claims by way of counterclaim. In other words, whether the defendant can prove the various particulars of loss as outlined above.

[9] If the defendant succeeds entirely or in part, then the further issue that arises is whether that sum can be set off from the judgment sum entered in favour of the plaintiff, or whether it is not entitled to set off any sum awarded in its favour in view of the order of the court in *Ranhill Engineers and Constructors Sdn Bhd v Setegap Berhad (in creditors' voluntary winding up)* Kuala Lumpur High Court Originating Summons No D-24NCC-433 of 2010 whereby Hamid Sultan Abu Backer J has ruled that the defendant is only entitled to pursue its counterclaim on condition that it procures the leave of the winding up court in dealing with any of the assets of the plaintiff.

THE DEFENDANT'S COUNTERCLAIM AT TRIAL

[10] The defendant called two witnesses in support of its claim. The first witness was one Khumasi @ Muhamad Rozaidi bin Manjanib, DW1 ('DW1') who was the senior project engineer in the defendant. It was his responsibility to ensure that projects under his supervision were completed in a timely manner and that the works were carried out to an adequate standard.

LATE COMPLETION OF PROJECT

[11] DW1 testified that he managed the New Mersing Water Supply Scheme project himself. He was conversant with the completion periods stipulated and confirmed that two extensions of time were accorded to the plaintiff. The first extension of time granted was from 27 October 2005 until 10 march 2006 while a second extension of time was granted from 11 March 2006 until 4 May 2006. Notwithstanding this, the plaintiff was unable to complete the project on time. The project was finally completed some 102 days later when the certificate of completion for the project was issued on 15 August 2006.

THIRD PARTY CONTRACTOR'S CLAIMS, ie PAYMENTS MADE TO MELLY ENTERPRISE AND SVARIKAT WADI IN RESPECT OF THE COMPLETION OF WORKS AND RECTIFICATION OF WORKS

[12] DW1 further testified that as the works were not completed and were to some extent defective the defendant was constrained to and did appoint two third parties to complete the work and make good the defects. Prior to the appointment of these contractors he maintained that seven reminders had been issued to the plaintiff but to no avail. Accordingly the appointment of these third parties had to be made.

[13] In further support of this aspect of the counterclaim, DW1 produced the letters of award granted to the contractors in question with the contract price. He also said that the plaintiff had been informed of the appointment of the contractors vide letter dated 9 September 2007. The plaintiff was also advised of the 20% surcharge plus costs that were to be charged to it as a consequence. In total as outlined above, DW1 testified that the quantum due and owing to the two third party contractors amounted to RM20,000 and RM61,140 respectively, inclusive of the surcharge. Without the surcharge the quantum paid to these contractors was RM17,250 and 50,950 respectively. Although DW1 confirmed this orally he produced no proof of payment to the two contractors (which the defendant took issue with subsequently). DW1 further explained why the third party contractors were appointed. He stated that Melly Enterprise was appointed to undertake work on a service water pipeline while Syarikat Wadi was appointed to undertake rectification works to procure the certificate of making good defects ('CMGD'). He relied on the letters of award or contracts awarded to these third party contractors which also stipulated the value of each contract.

[14] In the course of cross-examination, it was sought to be suggested to DW1 that there was no specific timeline for the completion of the project. He disagreed with this, contending that at the outset of their relationship at a kick-off meeting, timelines were set. He also disagreed when it was suggested to him that the two extensions of time were occasioned by reason of faults attributable to the defendant. He was queried about the need to appoint the two subcontractors and he explained why their services were necessary. He confirmed that the two contractors were paid by the defendant but said the proof of such payment was with the second witness for the defendant, the project accountant.

[15] In so far as the third party contractor's claims were concerned, namely the payments made to Melly Enterprise and Syarikat Wadi, the defendant's second witness, one Fery Efendy Laho, DW1 ('DW2') who was the project accountant, corroborated DW1's evidence. DW2 produced a consolidated

account of its claim against the plaintiff with particulars in respect of each head of claim. He explained that while the costs of the work carried out by Melly Enterprise amounted to RM17,250 an additional RM3,000 or 20% was levied as a surcharge. Similarly with Syarikat Wadi, while the contract sum was RM50,950 a 20% surcharge brought the amount now claimed from the plaintiff to RM61,140.

[16] In cross–examination, DW2 was asked whether there was any evidence that the plaintiff had agreed to the levy of a surcharge of 20%. He conceded that there was no consensus or agreement from the plaintiff for the levy of such a surcharge. He explained that this was charged as part of the operating costs of the defendant. When asked whether he had with him evidence of payment to these contractors, he stated that they had been paid, but preferred no documentary evidence in support.

[17] I shall deal with each head of the claim sought by the defendant as these claims arise. The plaintiff called no witnesses in support of its defence to the defendant's counterclaim but essentially put the defendant to proof of its entire claim. Having heard DW1 and DW2 and considered their oral evidence, I find that there is sufficient basis to conclude that the defendant did in fact appoint these two contractors to ensure the completion of the works as well as rectification works. The fact of their appointment is evident from the letters of appointment. The quantum of monies they were paid in terms of the contract sum is also evidenced in the letters of award handed to them. That the third party contractors were actually paid was orally affirmed by both DW1 and DW2. I have considered the submission of the plaintiff that no documentary evidence of payment to the defendant was produced at trial. However given the preponderance of evidence available on this issue, namely the letters of award and their contents, as well as the oral testimony of DW1 to the effect that they carried out the work stipulated in those letters of award to completion and the evidence of the project accountant to the effect that they were paid, I find that the defendant did in fact make payments in the sum of RM17,250 to Melly Enterprise and the sum of RM50,950 to Syarikat Wadi and are therefore entitled to make claim for these sums from the plaintiff. However I also find that the defendant is not entitled to the additional twenty per cent surcharge that it levied because such levy was unilateral. More importantly it cannot be said to be loss or damage incurred by the defendant in hiring these third party contractors to complete the plaintiff's work because the defendant did not actually make such payments to these third party contractors. The defendant is entitled to claim such loss and damage as it suffered as a matter of fact.

THE DEFENDANT'S CLAIM FOR THE COST OF MATERIALS BOUGHT ON BEHALF OF THE PLAINTIFF

[18] DW2 gave evidence on behalf of the defendant in respect of this head of

claim. In essence the defendant claims a sum of RM719,570.45 being the costs of materials purchased by the defendant on behalf of the plaintiff at the plaintiff's behest. In support of this claim DW2 pointed first to the consolidated statement of account where one column entitled 'Debit note Amount' details the quantum expended by the defendant on behalf of the plaintiff in respect of materials purchased. DW2 stated that the purchase of these materials was in actual fact, the responsibility of the plaintiff. However the plaintiff had requested that the defendant purchase these construction materials. In support of this statement DW2 made reference to a series of letters dating from 28 February 2005 until 28 October 2005 from the plaintiff to the defendant requesting that the defendant purchase the construction materials listed therein. In the first letter dated 28 February 2005 it is evident from the contents that the suppliers wanted to deal directly with the defendant to ensure timely payment. The letter ends with the plaintiff stipulating that ' … Purchase procedure shall be through your office to put up a purchase order to supplier upon our purchase order to you …'

[19] The plaintiff therefore clearly envisaged issuing a purchase order to the defendant. In other words the plaintiff fully intended to pay the defendant for the construction materials supplied. This is further corroborated when the plaintiff stipulates in the letter that: ' … Payment shall be deducted directly from our progress claim.'

[20] DW2 then testified that from the records, the defendant agreed to the plaintiff's request and duly purchased the material requested for by the plaintiff. In respect of these materials there was also an agreement as evidenced in the letter dated 13 May 2005 that a service charge of 2% would be levied on the cost of such materials. The defendant's claim for materials supplied is further supported by a series of debit notes issued by it to the plaintiff which were not disputed until trial. There are a total of seven debit notes which have all been produced in evidence. They provide further evidence to corroborate the fact that goods were supplied by the defendant to the plaintiff.

[21] In the course of cross-examination DW2 was asked for the purchase orders underlying the debit notes, which he said were in the possession of the defendant but which he had not brought with him. It was suggested that the mode of ordering was via purchase orders from the plaintiff to the defendant, but DW2 stated that the plaintiff had in fact sent letters and the defendant had issued purchase orders to third parties to meet the plaintiff's requests for construction materials. DW2 also confirmed that there was a 'mark up' of 2% on the costs of payment sought from the plaintiff for those materials purchased on its behalf. DW2 was also asked for the invoices from third parties to evidence the fact that these materials had in fact been purchased, but again he had not produced them in the documents before the court. He denied that

these claims for the supply of construction materials was fictitious. He was unable to produce evidence of payments made by the defendant to the third parties.

[22] Again I have considered the totality of the evidence available under this head. The strongest indication of the bona fides of the defendant's claim are in fact the plaintiff's own letters asking that the defendant purchase these goods on its behalf. There can be no clearer evidence that the plaintiff did in fact require the defendant to purchase construction materials on its behalf. The debit notes which were issued to the plaintiff but remained unchallenged until trial provide further evidence of the fact that these materials were indeed purchased and supplied to the plaintiff. The fact that the defendant did not produce purchase orders to third parties or evidence of payment to third parties cannot detract from the preponderance of evidence that shows that the claim is genuine. In the instant case as the plaintiff itself appears to have accepted in one of its letters that a service charge of 2% may be levied, entitles the defendant to make claim for this additional amount as well. I am satisfied that the defendant is entitled to make claim in the sum of RM719,570.45 in respect of this head of claim.

CONSULTANT OVERTIME CLAIMS

[23] The defendants also make claim for salary, overtime, travelling claims and petrol claims in relation to consultants. In support of this claim they produced an internal memorandum entitled 'Consultant Site Supervision Overtime Claim to be Debited to Subcontractor' dated 29 June 2006. It is evident from a perusal of the same that it is intended to be a general instruction in respect of all projects then underway. It directs that all overtime claims incurred in relation to consultants doing work on any of these projects was to be deducted from the subcontractor's progress claims.

[24] No other documents were produced to support this claim for RM68,401 save for this memorandum and the defendant's particulars of claim.

[25] It appears to this court that these claims are therefore unsupported by any documentary evidence such as time sheets in support of these overtime claims as well as rates of payment, the identity of the consultants to whom such payments were made and documents to show what work these consultants actually undertook. Finally the internal memorandum issued by the defendant suggests that it amounts to a unilateral imposition of these fees by the defendant on, inter alia, the plaintiff.

[26] In the absence of clear documentary proof that these charges were in fact incurred and in view of the fact that it is not apparent that this was a

necessary charge incurred by way of damages, it is not tenable for this court to allow this head of claim. It is therefore disallowed.

CLAIM FOR LIQUIDATED AND ASCERTAINED DAMAGES IN THE SUM OF RM1,049,000

[27] The evidence adduced at trial bears out the fact that the defendant granted the plaintiff two extensions of time from 27 October 2005 to 10 March 2006 and from 11 March 2006 until 4 May 2006. There can be no serious dispute about this because it is borne out by the oral evidence of DW1 as well as documentary evidence. The plaintiff produced no evidence by way of rebuttal. If anything the plaintiff sought to suggest that the extensions were occasioned by the fault of the defendant, but this too, it did not succeed in establishing as it called no witnesses.

[28] The certificate of practical completion was issued on 15 August 2006. Based therefore on delays from 5 May 2006, ie the day after the second extension of time, until the date of practical completion, there is a delay of 102 days.

[29] The contract provides that in the event of the failure of the plaintiff to meet the 'handover' date, it is liable to pay LAD of 0.1% of the total contract sum or RM10,940 per calendar day for a maximum of 10% of the total contract sum.

[30] With a delay of 102 days, the amount payable becomes RM1,069,980. As this exceeds 10% of the contract sum the defendant is only able to claim up to a maximum of 10% which amounts to RM1,049,000. That this is the provision in the contract and that is the correct computation is not in dispute.

[31] However the plaintiff maintains that the defendant is not entitled to claim this sum, notwithstanding the provisions of the contract because it has failed to establish that it has suffered a loss in the sum of RM1,049,000. In other words, the plaintiff maintains that the defendant has failed to establish or prove that as a consequence of the delay it actually suffered, in addition to the other heads of claim set out, the loss claimed in respect of LAD. This is primarily a matter of law.

[32] The plaintiff submitted that the law on claims for LAD is governed by s 75 of the Contracts Act 1950 which has been construed strictly by the Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ

817. In that case, the Federal Court held, inter alia, that:

(a) Section 75 of the Contracts Act 1950 ought to be given a restricted construction rather than a literal one;

(b) the words 'whether or not actual damage was proved to have been caused thereby' in s 75 are limited to those cases where the court finds it difficult to assess damages and these are cases where there is no known measure of damages employable for the court to assess damages. In these circumstances, the court may award damages which are reasonable and fair not exceeding the sum stipulated in the contract; and

(c) where damages could be assessed by settled rules, any failure to bring in further evidence or to prove damages for actual loss and damage will result in the refusal of the court to award such damages. In short, where damages could be assessed by settled rules, the plaintiff must prove the actual loss suffered to be able to claim the damages.

[33] In essence as stated by the plaintiff it would appear that the Federal Court has held that a party cannot claim simpliciter a stipulated sum fixed in the contract. It is incumbent upon the claimant to prove that he has suffered the loss he makes claim for.

[34] The ratio in *Selva Kumar*'s case (above) has been followed in a multitude of cases, (too many set out here in full), including, *Sim Hiang Kiaw & ors v Lee Hoi Kim Construction Co* [1995] MLJU 444; *Reliance Shipping & Travel Agencies v Low Ban Siong* [1996] 2 MLJ 543; [1996] 2 AMR 1793; *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461; *Hadland Arthur John & Anor v Audra Elaine Gomez* [2009] MLJU 736; *Atlantic Plantation Sdn Bhd v Mature Land Sdn Bhd* [2010] 8 MLJ 477; and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445 (FC).

[35] In *Johor Coastal Development* (above) an attempt was made to urge the Federal Court to depart from *Selva Kumar* and the series of authorities that followed it in relation to the construction of s 75. *Reliance* was placed on a decision of the Supreme Court of India in *Oil & Natural Gas Corp Ltd v Saw Pipes Ltd.* AIR 2003 SC 2629.

[36] The Federal Court however declined to do so. It held that *Oil & Natural Gas* fell within the category of cases where the loss suffered was incapable of assessment as recognised and set out in *Selva Kumar*'s case. It related to a case where if the court finds it difficult to assess damages as there is no known measure of damages employable the stipulated sum may be regarded as a genuine pre-estimate of damages and is therefore recoverable. The position in law remains as set out in *Selva Kumar*, namely that under s 75 a party having the

benefit of a liquidated damages clause in relation to losses is bound to prove that it has suffered such loss, notwithstanding the existence of the words ' whether or not actual damage or loss is proved to have been caused thereby'. *Selva Kumar* remains good law.

[37] The defendant on the other hand urges this court to consider that their claim for LAD does not fall under the strict interpretation given by the Federal Court in the case of *Selva Kumar*. The defendant refers, inter alia, to the case of *Keen Builders Sdn Bhd v Utara Dua (M) Sdn Bhd (Samudra (M) Sdn Bhd (Garnishee)* [1998] 2 CLJ Supp 256 where the High Court held that on the facts of that case there had been a delay in the completion of the project with so many variable factors to be considered including the fluctuation of the ringgit, such that as the parties had reached consensus on a figure this must fall squarely within the restricted and limited class of cases envisaged by the Federal Court in *Selva Kumar*'s case.

[38] The defendant here urged that this court adopt this approach and award the full claim for LAD made under the contract. The defendant also referred to the case of *Realvest Properties Sdn Bhd v The Co-operative Bank Limited (under receivership)* [1996] 2 MLJ 461; [1996] 3 CLJ 823 where the legality of an order for sale was challenged, inter alia, on the grounds that the imposition of additional interest contravened s 75 of the Contracts Act 1950. In that case Peh Swee Chin FCJ held that the essence of a penalty is a stipulated payment in terrorem of the party breaching the contract whereas in liquidated damages, it is a genuine pre-estimate by both parties of the damages for such breach of contract. He went on to explain that the provisions of the written law in s 75 do not supplant in toto the common law in relation to the question of penalties and liquidated damages. This being the case, when construing default interest in a contract it would then be necessary to consider in accordance with common law, whether it is in fact liquidated damages, ie a genuine pre-estimate or whether it is a penalty. It is urged upon this court to consider that the LAD claim here is a genuine pre-estimate by both parties which was agreed upon and is therefore not in terrorem or exorbitant, and is therefore claimable.

[39] It appears to this court that the issue in question here is not whether the LAD clause is a genuine pre-estimate or a penalty. The question that arises here is the primary issue arising in *Selva Kumar*'s case, namely whether the claimant has proved that he has suffered the loss he makes claim for. The issue of whether it is a genuine pre-estimate or a penalty is not the issue here.

[40] In the instant case, the defendant produced no evidence whatsoever in support of its claim for LAD save for referring to the relevant cl 8 in the contract, and showing that there was a delay. It produced no evidence at all to support its contention that it had suffered loss and damage in the sum of

RM1,049,000. Neither did the defendant provide any basis for the contention that this claim fell into the category of cases outlined in *Selva Kumar*'s case whereby there is no known measure of damages employable for the court to assess damages.

[41] In fact the defendant led evidence in relation to the various heads of loss that it had suffered, in the form of the costs of materials purchased, the cost of hiring other third party contractors etc. But it produced no evidence in relation to this head. As stated above, neither did it lead any evidence to suggest that this form of damages was not capable of assessment. As it stands, cl 8 is a standard LAD clause, and in the light of the construction accorded to s 75 in *Selva Kumar*'s case it is incumbent upon the defendant to produce evidence to support its contention that it suffered loss.

[42] As it has failed to do so, this court is bound by the construction accorded to s 75 in *Selva Kumar*'s case and accordingly adopts and follows the same. In the absence of any evidence to support the claim for loss and damage the defendant is not entitled to make claim for LAD in the sum of RM1,049,000 and this head of claim is disallowed.

[43] In conclusion therefore this court has allowed the defendant's claim for materials supplied in the sum of RM719,570.45 together with the claim for third party contractor's claims in the sum of RM17,250 and RM50,950 (ie without the surcharge of 20% which was levied unilaterally). This totals RM787,770.45. As matters stand therefore the defendant is entitled to judgment in respect of the counterclaim in the sum of RM787,770.45.

[44] The final issue that then arises is whether the defendant is entitled to set off the sum of RM787,770.45 from the judgment sum of RM1,525,814.64. While this would have been the procedure to have been adopted in most cases, the present case differs because the plaintiff has been wound up under a creditors' voluntary winding up. When leave was granted to the defendant to bring the counterclaim against the plaintiff there was a specific order issued by the High Court, (by Hamid Sultan Abu Becker J) in *Ranhill Engineers and Constructors Sdn Bhd v Setegap Berhad (in creditors' voluntary winding up)* Kuala Lumpur High Court Originating Summons No D-24NCC-433 of 2010 to the effect that:

> … The terms (for the grant of leave to proceed with the counterclaim) being that in the event the plaintiff succeeds in the counterclaim in that suit, the issue as to how the judgment sum ought to be dealt with may be by directions from the winding up court.

[45] The reference to the plaintiff above is a reference to the defendant in this

suit. It is apparent from the foregoing direction, by which this court is bound, that there can be no set off by the defendant of that part of the claim it has succeeded in proving in the sum of RM787,770.45. The defendant is bound to return to the winding up court to apply for directions on how it can make claim or execute upon the judgment it is entitled to. As there is no set off the plaintiff appears to be entitled on the basis of the consent judgment entered into at the outset of this trial, to judgment in the sum of RM1,525,814.64. I shall deal with the issue of costs upon hearing from learned counsel for the plaintiff and defendant upon delivery of this judgment.

Consent judgment entered and defendant's counterclaim allowed with no set off.

Reported by Kohila Nesan